

No. 9682

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**In the United States Circuit Court of Appeals  
for the Ninth Circuit**

ADOLPH B. SPRECKELS, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

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*ON PETITION FOR REVIEW OF THE DECISION OF THE UNITED  
STATES BOARD OF TAX APPEALS*

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**BRIEF FOR THE RESPONDENT**

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CLERK



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**OPINION BELOW**

The opinion of the Board of Tax Appeals (R. 22) is reported in 41 B. T. A. 1204.

**JURISDICTION**

This appeal involves a claim for the refund of an overpayment in income tax for the calendar year 1934 in the amount of \$4,087.61, of which \$2,816.72 has been allowed by the Board of Tax Appeals. (R. 34-38.) The appeal is from a decision of the Board entered August 5, 1940 (R. 34), and is brought to this Court by a petition for review filed October 19, 1940 (R. 35-38), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

## QUESTION PRESENTED

Whether the taxpayer may secure the refund of that portion of an overpayment of tax which depends upon an item of deduction claimed by the taxpayer for the first time in an amended petition filed with the Board of Tax Appeals more than three years after the payment of the tax, where he had filed a timely claim for refund based upon a different and unrelated item which was conceded in his favor and is reflected in the decision entered by the Board.

## STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra*, pp. 18-21.

## STATEMENT

The facts found by the Board of Tax Appeals (R. 24-26) and admitted by the pleadings (R. 15-17, 21-22) pertinent to this appeal may be summarized as follows:

The taxpayer, an individual who resides in San Francisco, California, filed his income tax return for the year 1934 with the Collector for the First District of California. (R. 24.)

The taxpayer was engaged in the business of purchasing and selling stocks, bonds and commodities for profit. He kept his books upon the basis of cash receipts and disbursements. In the year 1934, he paid to brokers selling commissions in the amount of \$23,692 in connection with sales of stocks, bonds and commodities. Upon the taxpayer's books, the selling commissions were deducted from the selling price

before net profit or loss was determined. In making his income tax return for the year 1934, the taxpayer did not deduct the selling commissions in computing income. (R., 24.)

The taxpayer's income tax return for 1934, filed on May 9, 1935, showed a net taxable income of \$121,593.86 and a tax of \$37,897.60, which was paid in instalments, the last payment being made December 16, 1935, in the amount of \$9,474.40. (R. 24-25.) The taxpayer reported on this return losses of \$114,249.38 from the sale of stocks and commodities, and took as a deduction \$2,000. (R. 25-26.)

On December 23, 1937, the taxpayer filed a claim for refund of income tax in the amount of \$4,087.61, on the ground that certain stamp taxes were paid that had not been claimed as deductions in the return. With the exception of \$80, this claim was allowed in the determination of the Commissioner in a deficiency letter dated July 20, 1938. (R. 13-14, 24-25.)

In the statement attached to the deficiency letter of July 20, 1938, it was shown that the adjustments which resulted in the deficiency were (1) an increase in the amount of dividends reported by the taxpayer as the beneficiary of a certain trust; (2) the disallowance of a deduction of \$16,967.02 for interest paid by the trustees of the trust on income tax deficiencies of the estate of the decedent, who had created the trust; (3) the disallowance of a deduction of \$700.80 for taxes paid on whisky withdrawn from bonded warehouses. (R. 11-13.)

On September 26, 1938, the taxpayer filed a petition to the Board of Tax Appeals. (R. 25.) This petition

alleged as the sole error on the part of the Commissioner the increasing of the taxpayer's distributive share of the income from the trust created under the will of Adolph B. Spreckels, deceased. (R. 5.) The petition further recited that the taxpayer during the calendar year 1934 had sold stocks, bonds and commodities, and had paid stamp taxes on these sales, in the amount of \$7,219.29, which the taxpayer had failed to deduct in computing his taxes for the calendar year 1934. The petition recited that the taxpayer had filed a claim for refund of \$4,087.61, income tax overpaid, for the calendar year 1934 by reason of his failure to deduct these stamp taxes; that the Commissioner had conceded in the deficiency letter transmitted to the taxpayer that the taxpayer was entitled to the deduction for these stamp taxes, and that by reason of the taxpayer's right to take this deduction, he was entitled to a refund on account of his income tax for the year 1934 in the sum of \$3,650.36. (R. 6-7.)

The Commissioner, in his answer to the petition, admitted the allegation that the taxpayer was entitled to a deduction of \$7,219.29 in 1934 for stamp taxes paid. (R. 16-17.)

On June 8, 1939, the taxpayer was granted leave by the Board to amend his petition to allege that during the year 1934 taxpayer paid selling commissions in the amount of \$23,909.29 in connection with sales of stocks, bonds and commodities; that these commissions paid by the taxpayer were not taken as a deduction in computing the taxpayer's income for that year, and that the Commissioner erred in not allowing as a deduction in his determination of the taxpayer's income the amount

of commissions so paid by the taxpayer. (R. 17-21.)

The prayer of the amended petition was that the Board should determine that the taxpayer had overpaid his income tax for the year 1934 in the sum of \$4,087.61. (R. 20.)

The error alleged in the original petition was disposed of by stipulation at the trial before the Board. (R. 23.) The Board stated that two questions were presented by the amended petition filed on June 8, 1939: first, whether a trader in securities may deduct, as an ordinary and necessary business expense, selling commissions paid by him; and second, whether a claim for overpayment set forth in an amended petition filed more than three years after payment of the last instalment of tax is timely. (R. 23.) The Board held that the taxpayer was entitled to a deduction for the selling commissions, and found that the taxpayer had overpaid his tax for the year 1934. The Board further held, however, that only \$2,816.72 of this overpayment might be refunded, and that the balance of the overpayment, which resulted from the allowance of the deduction claimed for the first time in the amended petition, was barred by the statute of limitations because of the failure of the taxpayer to assert a proper claim therefor within three years of the last payment of tax. (R. 26-31, 34.)

#### SUMMARY OF ARGUMENT

#### I

This case is an appeal by the taxpayer from a determination by the Board of Tax Appeals that the taxpayer had overpaid his tax for the year 1934, but

that part of this overpayment was barred by statute from being refunded to the taxpayer. The amount of the overpayment which the Board held was barred depends solely upon the allowance by the Board of a deduction for brokerage commissions. In case No. 9687, which involves the year 1935 and which comes to this Court on the Commissioner's petition for review, the Government contends that the taxpayer is not entitled to deduct brokerage commissions as an ordinary and necessary business expense. The Government takes a similar position in the present case as a ground for upholding the Board's decision for the year 1934, and respectfully refers to its brief in case No. 9687 for a discussion of the taxpayer's right to the claimed deduction. If the Government is upheld in this contention, it will be unnecessary to consider whether the Board was correct in holding that the overpayment was barred from refund.

## II

In any case which goes to the Board of Tax Appeals on a petition for the redetermination of a deficiency asserted by the Commissioner, the Board is given jurisdiction to determine that there has been an overpayment rather than an underpayment of tax. The statute, however, provides that no credit or refund shall be made of any portion of the tax determined to have been overpaid unless the Board determines as part of its decision that it was paid within three years before the filing of the claim or the filing of the petition, whichever is earlier.

In the present case the taxpayer asserted a right to the deduction for brokerage commissions, which gives rise to the portion of the overpayment in question on this appeal, for the first time in an amended petition filed with the Board more than three years after the payment of his tax for 1934. The taxpayer does not rely upon the amended petition as a timely assertion of his right to a refund of the overpayment, but places sole reliance upon a claim for refund filed by him. This claim was timely filed, but it was specific in stating only one ground for refund; namely, that the taxpayer was entitled to a deduction for stamp taxes. The deduction claimed in the refund claim has been allowed the taxpayer and is reflected in that part of the overpayment determined by the Board to be refundable. The refund claim does not constitute a timely and proper claim for the refund of the portion of the overpayment of tax which depends upon the new and unrelated ground asserted for the first time in the amended petition. The Board was accordingly correct in holding that the portion of the overpayment dependent upon the new issue was barred from refund.

## ARGUMENT

### I

#### Introduction

The petition which the taxpayer filed with the Board of Tax Appeals related to asserted deficiencies in taxes for two years, 1934 and 1935. In an amendment to the petition, the taxpayer raised for the first time the question whether he was entitled to deduct from gross in-

come as an ordinary and necessary business expense amounts paid as brokerage commissions on sales of securities. This question is applicable to both years and was decided by the Board in favor of the taxpayer. The other questions bearing upon the tax liability of taxpayer were settled by stipulation.

For the taxable year 1935, the Commissioner has filed a petition for review, docketed in this Court as case No. 9687, in which he urges that the Board's decision with respect to the brokerage commissions is erroneous.

The present appeal is by the taxpayer from the decision of the Board for the year 1934 determining that the taxpayer had overpaid his tax for that year, but that part of the overpayment was barred by statute from being refunded. The portion of the overpayment which the Board held was barred from refund depends solely upon the allowance which was made by the Board of the deduction for brokerage commissions on sales of securities, and the portion which it held was refundable results from the other issues settled by stipulation.

As a ground for sustaining the final decision of the Board in the present case, the Commissioner submits that the brokerage commissions on sales of securities are not deductible as an ordinary and necessary business expense, and respectfully refers to his brief in case No. 9687 for a discussion of that question. If the Commissioner's position on that question should be upheld by this Court, it will mean that the portion of the overpayment involved in the present appeal will be wiped out, and therefore it will be unnecessary for this Court to pass upon the further question presented by the tax-

payer in this case, which we discuss below, as to the correctness of the Board's holding that the portion of the overpayment dependent upon the issue of brokerage commissions is barred from refund.

## II

**No proper and timely claim or petition for overpayment of tax in excess of \$2,816.72 was filed by the taxpayer, and hence the Board properly limited the refundible portion of the overpayment to that amount**

Section 272 of the Revenue Act of 1934, *infra*, p. 18, provides for the filing with the Board of Tax Appeals of a petition for a redetermination of any deficiency asserted by the Commissioner.<sup>1</sup> Section 322 (d) of that Act provides that if the Board finds that there is no deficiency, and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year for which the Commissioner has determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall be credited or refunded to the taxpayer. That subdivision further provides:

No such credit or refund shall be made of any portion of the tax unless the Board determines as part of its decision that it was paid within three years before the filing of the claim or the filing of the petition, whichever is earlier.

The Commissioner concedes that the taxpayer overpaid his tax for 1934 in the amount of \$2,816.72 and that this amount is refundible, as found by the Board.

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<sup>1</sup> Substantially the same statutory provisions referred to herein are contained in the Internal Revenue Code under the same section numbers.

Whether there is any overpayment in excess of that amount depends upon whether the taxpayer is entitled to a deduction as an ordinary and necessary business expense of amounts paid by him for brokerage commissions on sales of securities. The Board decided that the taxpayer was entitled to this deduction for the brokerage commissions. Since it further held, however, that no part of the overpayment resulting from this deduction could be refunded, it did not make a computation of the total amount by which the taxpayer had overpaid his tax. For the purposes of the question on this appeal, we may assume that the taxpayer has correctly computed (Br. 5) the amount to be \$15,122.56.

The taxpayer did not take the deduction for brokerage commissions in his return for 1934, but first asserted a right to that deduction by an amended petition filed with the Board on June 8, 1939, which was more than three years after the payment of the last instalment of his tax for 1934. The taxpayer implicitly concedes (Br. 5, 7, 22) that the amended petition does not relate back to the filing of the original petition with the Board, and accordingly he does not seek a refund of the entire amount by which he says he has overpaid his tax. This concession by the taxpayer is in recognition of the uniform holding of the courts and the Board that an amended petition filed more than three years after payment of tax asserting for the first time a ground which results in the determination of an overpayment will not support the refunding of that overpayment. *Commissioner v. Rieck*, 104 F. (2d) 294 (C. C. A. 3rd), certiorari denied, 308 U. S. 602; *Com-*

*missioner v. Dallas' Estate*, 110 F. (2d) 743 (C. C. A. 2nd); *Denholm and McKay Co. v. Commissioner*, 41 B. T. A. 986.

The taxpayer places sole reliance upon the claim for refund which he filed on December 23, 1937, and limits the amount which he seeks to recover to the \$4,087.61 sought in that claim. The claim itself was timely, but it stated as the specific ground for refund that certain stamp taxes had been paid by the taxpayer which he had failed to take as deductions in his income tax return. The Commissioner conceded in the determination of the deficiency from which the taxpayer appealed to the Board, as well as in his answer filed with the Board, that the taxpayer was entitled to the deduction for stamp taxes, which formed the basis of the refund claim. In the computation of the overpayment of \$2,816.72 which the Board has found to be refundable, the taxpayer has been allowed a deduction for the full amount of the stamp taxes. The fact that the Board found a refundable overpayment of \$2,816.72 rather than an overpayment of \$4,087.61 as claimed by the taxpayer, or a deficiency as originally asserted by the Commissioner, was due to adjustment pursuant to stipulation of gross income to an amount greater than originally reported by the taxpayer but less than determined by the Commissioner in his deficiency notice.

Since the overpayment of \$2,816.72 determined by the Board to be refundable reflects an allowance to the taxpayer of all adjustments which he sought in his claim for refund, we submit that the Board was correct in the present case in holding (R. 29, 30) that the

original refund claim was disposed of and that the taxpayer should not be heard to rely upon that claim to support the refunding to him of the portion of the overpayment of tax dependent upon a new and entirely unrelated matter not referred to in the claim.

Article 322-3 of Treasury Regulations 86, promulgated under the Revenue Act of 1934, *infra*, p. 20, provides that a claim for refund must set forth in detail each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis of the claim. That article further provides:

No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed prior to the expiration of such period. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund.

Earlier and later regulations are to the same effect. Art. 1253, Treasury Regulations 77, promulgated under Revenue Act of 1932; Art. 322-3, Treasury Regulations 94, promulgated under Revenue Act of 1936; Art. 322-3, Treasury Regulations 101, promulgated under Revenue Act of 1938; Sec. 19.322-3, Treasury Regulations 103, promulgated under Internal Revenue Code. These regulations must be deemed to have received the approval of Congress. See *Helvering v. Reynolds Co.*, 306 U. S. 110; *Morrissey v. Commissioner*, 296 U. S. 344.

It is well settled that in a suit in the District Court or in the Court of Claims by a taxpayer for the recovery of an alleged overpayment of tax, no recovery may be had upon a claim for a refund which sets forth a specific ground different from that asserted in the suit. *United States v. Andrews*, 302 U. S. 517; *United States v. Garbutt Oil Co.*, 302 U. S. 528; *Pelham Bell Co. v. Carney*, 111 F. (2d) 944 (C. C. A. 1st); *Marks v. United States*, 98 F. (2d) 564 (C. C. A. 2d); *Livermore v. Miller*, 94 F. (2d) 111 (C. C. A. 5th); *Dysart v. United States*, 95 F. (2d) 652 (C. C. A. 8th). It is also settled that a timely claim for refund setting forth a specific ground may not be amended to assert a new and different ground after the statutory period for the filing of claims has run. *United States v. Andrews, supra*; *United States v. Garbutt Oil Co., supra*.

The fact that in a suit for the recovery of an overpayment of tax the amount sought to be recovered is limited to the amount stated in a timely claim for refund does not entitle the taxpayer to recover where the ground of suit is different from the ground of the refund claim. Thus, in the *Garbutt Oil Co.* case, *supra*, the taxpayer had filed a timely claim for refund for \$3,105.65 based upon a specific ground. He brought suit for this amount, and at the trial the grounds of the refund claim originally filed were abandoned and recovery was sought upon the basis of a statement filed with the Commissioner after the expiration of the statutory period of limitation. The Supreme Court held that both the Commissioner and the courts were without authority to grant the refund.

It is clear therefore that the claim for refund upon which the taxpayer relies in the present case would not have supported the recovery of the amount sought if the suit had been one in the District Court or in the Court of Claims. The claim was specific in stating as the ground the right of the taxpayer to a deduction for stamp taxes paid by him. That deduction was allowed to the taxpayer. The amount here sought is based upon an asserted right to a deduction for brokerage commissions paid by the taxpayer, which deduction was claimed by the taxpayer for the first time more than three years after he had paid his tax for the year 1934. There is no reason to believe that a claim for refund which will not support a recovery in a suit in the District Court or the Court of Claims will support the refunding of an overpayment of tax where the proceeding is in the Board of Tax Appeals. Indeed, the reasoning of the courts in *Commissioner v. Rieck*, *supra*, and *Commissioner v. Dallas' Estate*, *supra*, holding that an amended petition filed with the Board after the expiration of the period for filing claims, asserting for the first time a ground which results in the determination of an overpayment, will not support the refunding of the overpayment, was based upon the analogy to the amendment of claims for refund; and the courts held that the decisions of the Supreme Court in the *Andrews* and *Garbutt Oil* cases, *supra*, were decisive of the question before them. The principles announced by the Supreme Court in the *Andrews* case and the *Garbutt Oil* case are of even clearer application in the instant case than they were in the *Rieck* and *Dallas* cases. As stated in the Regulations, a claim for

refund is considered a proper claim only as to the grounds set forth in the claim. We submit, accordingly, that the Board of Tax Appeals was correct in holding that the taxpayer might not rely upon the claim for refund as a basis for the refunding to him of the alleged overpayment.

The taxpayer argues (Br. 17) that, prior to the present decision, the practice in the Bureau of Internal Revenue had been in accord with the rule which he contends should be followed by the Board; namely, that the correct tax liability should first be determined on the basis of all the facts affecting that liability, and that the amount of the refund should then be determined, which cannot be more than the amount of overpayment actually made nor more than the amount covered by a timely refund claim. The taxpayer states that the rule followed in the Bureau is set forth in G. C. M. 9800, X-2 Cum. Bull. 271 (1931). We may assume in the present case that the correct tax liability of the taxpayer is to be determined by the inclusion of all proper items both of income and of deduction, regardless of time limitations, and that the difference between the result of this computation and the tax actually paid by the taxpayer constitutes an overpayment. The question here, however, is what portion, if any, of that overpayment may be refunded to the taxpayer. As we have pointed out above, the decisions uniformly hold that only the part of the tax overpaid which is represented by items set forth in timely claims for refund may be refunded. This rule is stated several times in G. M. C. 9800, to which the taxpayer refers, and an analysis of the computations made in the

ruling will show that only the portion of the overpayment depending upon items contained in timely claims for refund were held to be refundible. The ruling ends with the statement—

The tax actually paid may be refunded or credited to the extent of the overpayment represented by the allowable items covered by timely claims when claims are necessary.

Moreover, the Bureau practice as to the granting of refunds is clearly set forth in the Treasury Regulations to which we have referred above.

At pp. 22-26 of the taxpayer's brief, there is a discussion of the duty of the Board to determine the amount of overpayment, and it is stated (Br. 23-24) that had the Board here first determined the overpayment on the basis of its findings, it would have found that the taxpayer had overpaid his income tax for the year 1934 by \$15,122.56. As we have heretofore stated, it may be assumed upon this appeal that if the Board had made the actual computation pursuant to its findings, it would have determined that the taxpayer had overpaid his tax in the sum stated by the taxpayer. The actual amount of the overpayment, however, becomes immaterial in view of the Board's holding that it could not in any event be refunded to the taxpayer. The holding of the Board in this latter respect was correct and should be affirmed.

The taxpayer suggests (Br. 27) that the answer to the amendment to the petition does not raise the bar of the statute. Whether the answer did or did not raise the point is immaterial. Before the taxpayer is entitled to a refund of any portion of an overpayment of tax, he

must show that he has complied with the statutory requirement as to the filing of a proper claim or petition for such overpayment. The statute is mandatory and may not be waived by the Commissioner. *United States v. Garbutt Oil Co., supra; Commissioner v. Rieck, supra.*

CONCLUSION

The decision entered by the Board of Tax Appeals is correct and should be affirmed.

Respectfully submitted.

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SEWALL KEY,  
LEE A. JACKSON,

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FEBRUARY, 1941.

## APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

### SEC. 272. PROCEDURE IN GENERAL.

(a) *Petition to Board of Tax Appeals.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 90 days after such notice is mailed (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. \* \* \*

\* \* \* \* \*

(e) *Increase of Deficiency After Notice Mailed.*—The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed—if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing.

\* \* \* (U. S. C., Title 26, Sec. 272.)

### SEC. 322. REFUNDS AND CREDITS.

(a) *Authorization.*—Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

(b) *Limitation on Allowance.*—

(1) *Period of Limitation.*—Unless a claim for credit or refund is filed by the taxpayer within

three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) *Limit on Amount of Credit or Refund.*—The amount of the credit or refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or, if no claim was filed, then during the three years immediately preceding the allowance of the credit or refund.

(c) *Effect of Petition to Board.*—If the Commissioner has mailed to the taxpayer a notice of deficiency under section 272 (a) and if the taxpayer files a petition with the Board of Tax Appeals within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As to overpayments determined by a decision of the Board which has become final; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and

(3) As to any amount collected after the period of limitation upon the beginning of distraint or a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Board which has become final, as to

whether such period has expired before the notice of deficiency was mailed, shall be conclusive.

(d) *Overpayment Found by Board.*—If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer. No such credit or refund shall be made of any portion of the tax unless the Board determines as part of its decision that it was paid within three years before the filing of the claim or the filing of the petition, whichever is earlier.

\* \* \* (U. S. C., Title 26, Sec. 322.)

Treasury Regulations 86 (promulgated under Revenue Act of 1934):

ART. 322-3. *Claims for refund by taxpayers.*—Claims by the taxpayer for the refunding of taxes, interest, penalties, and additions to tax erroneously or illegally collected shall be made on Form 843, and should be filed with the collector of internal revenue. A separate claim on such form shall be made for each taxable year or period. The claim must set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed prior to the expiration of such period. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund. With re-

spect to limitations upon the refunding or crediting of taxes, see article 322-6.

\* \* \* \* \*

ART. 322-7. *Limitations upon the crediting and refunding of taxes paid.*— \* \* \*

(b) In any case where a person having a right to file a petition with the Board of Tax Appeals with respect to a deficiency in income tax imposed by the Act files such petition within the prescribed time, no credit or refund of the tax for the year to which the deficiency relates shall be allowed or made, and no suit for the recovery of any part of such tax shall be instituted by the taxpayer, except that—

(1) If the Board finds that there is no deficiency but that the person has overpaid his tax for the year to which the notice of deficiency relates, and the decision of the Board as to the amount overpaid has become final (see section 1005 of the Revenue Act of 1926), the overpayment shall be credited or refunded, but no such credit or refund shall be made of any portion of the tax unless the Board determines as part of its decision that it was paid not earlier than three years before the filing of the refund claim therefor or the filing of the petition, whichever event occurs first in point of time, or if no claim is filed, not earlier than three years before the filing of the petition.

\* \* \* \* \*

